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In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT M. POSTAL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Question presented 2

Treaty involved 2

Statement 2

Argument 6

Conclusion 13

CITATIONS

Cases:

Adams v. *Williams*, 407 U.S. 143 12

Cook v. *United States*, 288 U.S. 102 ..... 7, 8

Delaware v. *Prouse*, No. 77-1571 (Mar. 27, 1979) 12

Frisbie v. *Collins*, 342 U.S. 519 ..... 7, 10

Gerstein v. *Pugh*, 420 U.S. 103 7

Ker v. *Illinois*, 119 U.S. 436 7

Terry v. *Ohio*, 392 U.S. 1 12

The Over the Top, 5 F. 2d 838 8

The Richmond v. *United States*, 13 U.S. 9 Cranch 102 9

United States v. *Brignoni-Ponce*, 422 U.S. 873 ..... 11, 12

Page

Cases—(continued):

United States v. *Cadena*, 585 F. 2d 1252 ..... 9, 10
United States v. *Cortes*, 588 F. 2d 106 12
United States v. *Freeman*, 579 F. 2d 942 ..... 11, 12
United States v. *Odom*, 526 F. 2d 339 11
United States v. *One 43 Foot Sailing Vessel*, 405 F. Supp. 879, aff'd, 538 F. 2d 694 9
United States v. *Petrulla*, 457 F. Supp. 1367 9
United States v. *Ramsey*, 431 U.S. 606 ..... 11, 12
United States v. *Warren*, 578 F. 2d 1058 11

United States Constitution, treaty, statutes and regulation:

United States Constitution Fourth Amendment 2, 5, 6, 10, 11
Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200 2
Article 6 ..... 2, 6
Article 22 6
14 U.S.C. 89(a) 9, 11
14 U.S.C. 89(b) 11

Page

United States Constitution, treaty, statutes and regulation (continued):

19 U.S.C. 1401(j) 11
19 U.S.C. 1581 11
19 U.S.C. 1581(a) 11, 12
21 U.S.C. 846 3
21 U.S.C. 963 2
19 C.F.R. 162.3(a)(1) 11

Miscellaneous:

Restatement (Second) of Foreign Relations Laws of the United States (1965) 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a to 57a) is reported at 589 F. 2d 862.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1979. The petition for a writ of certiorari was not filed until May 14, 1979, and is thus substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the seizure of petitioners on the high seas, in violation of a treaty to which the United States is a signatory, divested the trial court of in personam jurisdiction.

2. Whether the Coast Guard had statutory authority to board petitioners' vessel and to arrest them on the high seas.

3. Whether the initial boarding by the Coast Guard of petitioners' vessel within customs waters of the United States violated the Fourth Amendment.

TREATY INVOLVED

Article 6 of the Convention on the High Seas[1] provides in pertinent part:

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

STATEMENT

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to import marijuana into the United States, in violation of 21 U.S.C. 963, and of conspiring to possess marijuana with

[1] 13 U.S.T. 2312, T.I.A.S. No. 5200, opened for signature April 29, 1958 (hereafter "High Seas Convention").

intent to distribute it, in violation of 21 U.S.C. 846. Petitioners Postal and Chitty were each sentenced to one year's imprisonment, and petitioner Forsythe was sentenced to nine months' imprisonment. Each sentence was to be followed by a four year term of special parole. The court of appeals affirmed (Pet. App. 1a-57a).

1. The evidence showed that during late June 1976, petitioner Chitty directed the outfitting of the *La Rosa*, a fifty-one foot pleasure sailing vessel, in Fort Lauderdale, Florida (Pet. App. 12a, 45a-46a). The vessel was purchased by a corporation registered in the Grand Cayman Islands, a territory of the United Kingdom, and Chitty, acting on behalf of the corporation, tendered approximately $21,000 of the $153,000 purchase price in Fort Lauderdale (*id.* at 7a, n.8, 46a). Thereafter, the *La Rosa* was delivered in Bimini on July 3, 1976, and Chitty and Postal flew to Bimini on that date. The vessel left Bimini on or about July 4, 1976, sailed to South America, and returned, arriving off the Bahamas on September 13, 1976. She then continued in a southwesterly direction, heading toward Miami (*id.* at 46a-47a).

On the morning of September 15, 1976, the Coast Guard cutter *Cape York* sighted the *La Rosa* approximately 8.5 nautical miles southeast of Upper Matecumbe Key, one of the Florida Keys. At that time the vessel, with all three petitioners aboard, displayed no flag and exhibited neither her name nor home port on her stern. Lieutenant Beardsworth, the commanding officer of the *Cape York*, approached to within 25 yards of the *La Rosa* and inquired as to her origin and destination. Two of the *La Rosa*'s crew held up a flag that was later identified as that of the Grand Cayman Islands, although at the time of the inquiry its identity was uncertain.

Petitioner Postal also stated that his crew was Australian, that the vessel was of Grand Cayman registry, and that they were en route from the Bahamas to Belize, British Honduras (Pet. App. 2a-3a).

After consulting with Coast Guard Headquarters in Miami, Florida, and repeating these inquires to the *La Rosa*'s crew, Beardsworth decided that the vessel should be boarded to verify her documentation papers. Accordingly, he ordered her to heave to and stand by for boarding. After Postal refused to permit the boarding, Beardsworth again consulted his superiors, who directed him to board the *La Rosa*. Postal agreed to receive one boarder (Pet. App. 3a).

The *La Rosa* then began to maneuver erratically, and papers were observed being jettisoned from the vessel. The documents were retrieved and later proved to be portions of the ship's log. Following these events, Chief Petty Officer Lewis boarded the vessel, which was then approximately 10.5 nautical miles from the United States coast. Postal agreed to show Lewis the *La Rosa*'s documents, but he refused to produce the crew's personal identifications (Pet. App. 3a-4a).

Before producing the documents, however, Postal asked Lewis whether he would accept a bribe. Lewis rejected the offer, but Postal repeated it, stating that he had been in the Coast Guard but had found a better way to make a living. Lewis again refused the offer. Lewis then remarked that the crew members were not Australian, as Postal had claimed, and several of them responded jokingly, "Why, don't we sound like them?" In addition, Lewis observed that the vessel's hatches, which had been open before the boarding, were closed and that Chitty was sitting on one of them (Pet. App. 4a).

Postal then produced documents showing that the *La Rosa* was registered in the Grand Cayman Islands. This information was relayed to Coast Guard Headquarters in Miami, which verified the registry, and Lewis returned to the *Cape York*. Upon his return, Lewis told Beardsworth of his experience and observations and expressed his belief that the vessel was transporting contraband (Pet. App. 4a-5a).

These additional facts were communicated to Coast Guard headquarters, which directed the *Cape York* to maintain surveillance. At this point, the *La Rosa* altered its course from one roughly parallel to the Florida coast to one running 35° away from it. Following further consultation with headquarters, Beardsworth decided to reboard the *La Rosa* to conduct a customs search, and the *Cape York* approached the vessel under a show of force. Lewis and two other armed Coast Guardsmen boarded the *La Rosa* the second time, approximately two and a half hours after the first boarding; the *La Rosa* was then about 16 miles from the nearest United States coastline (Pet. App. 5a).

Lewis discovered approximately 8,000 pounds of marijuana in the *La Rosa*'s hold and arrested petitioners, who, with their vessel, were then taken to Miami (Pet. App. 6a-7a).

2. Prior to trial, petitioners moved to dismiss the indictment and to suppress the evidence on the ground that the boardings and the seizure of the vessel violated international law and the Fourth Amendment (S. Tr. 13). The motions were denied (S. Tr. 337). On appeal petitioners reiterated the same claims (Pet. App. 11a-12a). The court of appeals held that the first boarding was permissible under international maritime law as an

exercise of the right of approach codified in Article 22 of the High Seas Convention,[2] because the Coast Guard reasonably suspected that the vessel was of United States registry (Pet. App. 13a).

The court of appeals further held, however, that "the second boarding of the *La Rosa*, * * * was in violation of Article 6 of the High Seas Convention [which accords exclusive jurisdiction over vessels on the high seas to the flag state] * * * because no treaty provision justifie[d] the second boarding or the ultimate seizure * * * " (Pet. App. 15a). It concluded, nonetheless, that the treaty violation did not divest the district court of jurisdiction over petitioners (*id.* at 18a-42a). The court also rejected petitioners' Fourth Amendment claims (*id.* at 52a-55a).

ARGUMENT

1. Petitioners contend (Pet. 4-12) that the trial court lacked jurisdiction over their persons because they were arrested in violation of Article 6 of the High Seas Convention. The court of appeals correctly rejected this contention.[3]

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[2]Article 22 of the High Seas Convention provides in pertinent part:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> * * * * *
>
> (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality of the same nationality as the warship.

[3]Although petitioners argued in the district court and the court of appeals that the violation of the High Seas Convention also required the suppression of evidence, they do not present that question for this Court's review. The contend here only that the treaty violation deprived the district court of jurisdiction.

It is well-established that the unlawful manner by which jurisdiction is acquired over a criminal defendant does not deprive a court of jurisdiction to try the defendant. *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). *Cook* v. *United States*, 288 U.S. 102 (1933), on which petitioners primarily rely, established a limited exception to that principle when it ordered the dismissal of an in rem action against a British liquor smuggling vessel that was seized in violation of a bilateral treaty between the United States and Great Britain dealing specifically with and limiting the authority of the United States to board, search, and seize British vessels suspected of smuggling alcoholic beverages into the United States. Whether the treaty violation in *Cook* would have required dismissal of a criminal action against the crew members was not considered or decided by the Court,[4] but, in any event, the court of appeals correctly concluded that the principal of *Cook* does not aid petitioners.

As the court of appeals held (Pet. App. 22a-24a), and as petitioners concede (Pet. 5-6), whether or not a treaty affects the domestic law of the United States, including the law concerning the jurisdiction of its courts, depends on whether the treaty provision at issue is self-executing or, on the other hand, is merely executory—*i.e.* requires

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[4]In our view it is doubtful that the Court in *Cook* would, for example, have required dismissal of the prosecution of a crew member charged with a murder committed in the United States merely on the basis of the treaty violation.

legislation in order to become part of the domestic law.[5] The question in this case and in *Cook* is not whether the terms of the treaties, standing alone, prohibited the seizures—in both cases they did—but whether the terms of the treaties, standing alone, divested the courts of the United States of jurisdictions in the proceeding. In *Cook*, this Court concluded that the provisions of the treaty with Great Britain, standing alone, served to deprive the courts of the United States of jurisdiction over the in rem action, because the treaty expressly stated that if a vessel were seized in accordance with its provisions, the "vessel may be seized and taken into a port of the United States, its territories or possessions *for adjudication in accordance with such laws.*" See *Cook, supra,* 288 U.S. at 111 (emphasis supplied). The Court concluded that, by that provision, the United States intended to withdraw the jurisdiction of its courts over vessels seized in violation of the treaty. In that respect the Court described the treaty provision as "self executing" (*id.* at 119). The Court stated (288 U.S. at 121-122):

> The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. * * * To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

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[5]For example, the fact that a treaty merely prohibits certain acts does not mean that a person committing those acts may be criminally prosecuted and punished in the absence of additional domestic legislation making the conduct criminal and establishing penalties for it. *The Over The Top,* 5 F. 2d 838, 845 (D. Conn. 1925). See generally, *Restatement (Second) of Foreign Relations Laws of the United States* §141 (1965).

The High Seas Convention contains no similar provision dealing with the jurisdiction of the courts of signatory nations to adjudicate offenses discovered as a result of violations of the Convention, and the court of appeals correctly held (Pet. App. 27a-42a) that nothing in the purpose or history of the Convention indicates an intent to affect such jurisdiction. In this case, accordingly, the general rules apply that the manner by which a person is seized does not affect the jurisdiction of a criminal court and that violations of international obligations embodied in international law or treaties are matters for the affected sovereigns to resolve, and they provide no enforceable rights on the part of individuals. See *The Richmond* v. *United States,* 13 U.S. (9 Cranch) 102, 103 (1815); *United States* v. *Cadena,* 585 F. 2d 1252, 1261 (5th Cir. 1978).[6]

2. Petitioners also claim (Pet. 11-12) that the Coast Guard lacked "constitutional and statutory authority" (Pet. 11) to seize and board their vessel because it was a pleasure craft and was sailing beyond the 12 mile customs enforcement zone at the time of the seizure. To the extent this argument is based on the violation of the High Seas Convention, we have discussed it in Point 1, *supra.* To the extent it is based on an alleged violation of statutory authority, it is incorrect. 14 U.S.C. 89(a) empowers the Coast Guard to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas

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[6]Contrary to petitioners' claim (Pet. 6-7), neither *United States* v. *One 43 Foot Sailing Vessel,* 405 F. Supp. 879 (S.D. Fla. 1975), aff'd, 538 F. 2d 694 (5th Cir. 1976), nor *United States* v. *Petrulla,* 457 F. Supp. 1367 (M.D. Fla. 1978), holds or suggests that the provisions of the High Seas Convention, standing alone, divest the courts of the United States of jurisdiction over persons seized in violation of the Convention.

and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." See *United States* v. *Cadena, supra,* 585 F. 2d at 1259, upholding the Coast Guard's statutory authority in a similar case.[7] Petitioners do not dispute that the events which preceded the boarding, particularly the vessel's evasive maneuvering to avoid the initial inspection, the jettisoning of the vessel's log, the captain's false responses concerning the nationality of the crew, and Postal's efforts to bribe Chief Petty Officer Lewis, provided abundant probable cause to believe petitioners were participants in conspiracy to violate the laws of the United States. In any event, as the court below noted (Pet. App. 43a), even if the Coast Guard had acted in excess of its statutory authority, that would not affect the court's jurisdiction over persons brought before it. *Frisbie* v. *Collins, supra,* 342 U.S. at 522.

3. Petitioners also contend (Pet. 12-16) that the initial boarding of the *La Rosa*, when it was 8.5 miles from the United States and thus within the customs waters of the United States, violated the Fourth Amendment because it was allegedly not based on reasonable suspicion. That claim is incorrect because neither the pertinent statutes nor the Fourth Amendment require any degree of

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[7]Petitioners attempt (Pet. 12) to distinguish *Cadena* on the ground that the vessel there was registered to a nation that had not yet ratified the High Seas Convention. But that fact would be relevant only to petitioner's argument that the Convention was violated here (which is not disputed) and that such a violation ousts the district court of jurisdiction (which we do dispute; see Point 1, *supra*). It is entirely irrelevant to the claim that petitioners' arrests were in excess of the Coast Guard's statutory authority.

suspicion before the Coast Guard may board a vessel in the customs waters of the United States in order to check its documents, and because in this case there was reasonable suspicion that the *La Rosa* was not properly registered.

19 U.S.C. 1581(a) and 19 C.F.R. 162.3(a)(1) specifically authorize Coast Guard and other customs officers to make documentary checks of foreign and domestic vessels within the customs waters of the United States without probable cause or articulable suspicion.[8] Such document inspections within this zone are reasonable and do not violate the Fourth Amendment. See, *e.g., United States* v. *Freeman,* 579 F. 2d 942, 946-947 (5th Cir. 1978); *United States* v. *Warren,* 578 F. 2d 1058, 1066 (5th Cir. 1978) (en banc); *United States* v. *Odom,* 526 F. 2d 339 (5th Cir. 1976). See also *United States* v. *Ramsey,* 431 U.S. 606, 616-617, 622 (1977); *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 884 (1975).

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[8]19 U.S.C. 1581 provides pertinently that customs officers (defined by 14 U.S.C. 89(b) to include Coast Guard petty officers)

> may at any time go on board any vessel * * * at any place * * * within the customs waters [defined by 19 U.S.C. 1401(j) as those waters within twelve miles of the Coast of the United States] * * * and examine the manifest and other documents and papers and examine, inspect, and search the vessel * * * and every part thereof and any person, trunk, package, or cargo on board.

The relevant portion of 19 C.F.R. 162.3(a)(1) provides:

> A Customs Officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go onboard: (1) Any vessel * * * within the Customs waters of the United States * * *.

Moreover, Lieutenant Beardsworth in fact had reasonable suspicion that the *La Rosa* was not properly registered, and petitioners' claim to the contrary (Pet. 14-15) is refuted by the record. Although, upon inquiry, the crew displayed the flag of the Grand Cayman Islands, the vessel was flying no flag when initially sighted and she exhibited neither her name nor home port on her stern. As the court below recognized (Pet. App. 13a), in view of the requirements imposed by most national shipping laws that vessels fly the flag of the state of their registry and bear their names to permit visual identification, there was abundant ground for suspecting the vessel lacked proper registry even after her crew displayed a Grand Caymans flag. Hence even if, notwithstanding the statutory authority of Section 1581(a), reasonable suspicion were required as a predicate for the inspection, the requirement was fully satisfied. See *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 884; see also *United States* v. *Ramsey, supra,* 431 U.S. at 614-615; *Adams* v. *Williams,* 407 U.S. 143, 145-146 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 27, 30 (1968); *United States* v. *Cortes,* 588 F. 2d 106, 110-111 (5th Cir. 1979).[9]

[9]Petitioners' reliance (Pet. 13) upon *Delaware* v. *Prouse,* No. 77-1571 (March 27, 1979), and *United States* v. *Brignoni-Ponce, supra,* is misplaced. In the first place, neither of these cases involved a stop within the statutorily-defined customs zone or the functional equivalent of a border. See *United States* v. *Freeman, supra,* 579 F. 2d at 946. In addition, in both these cases police lacked a reasonable suspicion that the occupants of the vehicles were violating the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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